

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-1495

To be argued by
RICHARDS W. HANNAH

ORIGINAL

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

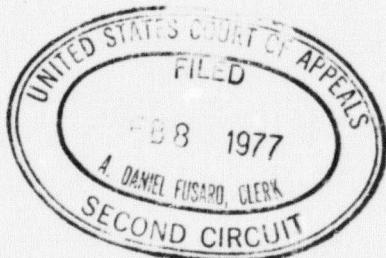
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EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY
DiMATTEO, SAVERIO CARRARA, MICHAEL DE-
LUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI,
SR., ROBERT VOULO and SABATO VIGORITO,

Defendants-Appellants.

On Appeal from a Judgment of the United States District
Court for the Eastern District of New York

BRIEF FOR APPELLANT ANTHONY DiMATTEO



RICHARDS W. HANNAH
Attorney for Appellant
Anthony DiMatteo
586 Fourth Street
Brooklyn, New York 11215
(212) 768-0611

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 76-1495

EUCENE SCAFIDI, BARIO MASCITTI,
ANTHONY DiMATTEO, SAVERIO CARRARA,
MICHAEL DeLUCA, JAMES NAPOLI, JR.,
JAMES V. NAPOLI, SR., ROBERT VOULO
and SABATO VIGORITO,

Defendant-Appellants,

-----X

BRIEF FOR APPELLANT
ANTHONY DiMATTEO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the appellant, DiMatteo, has standing to challenge the electronic search at apartment 309.
2. Whether the appellant, DiMatteo's rights under 18 U.S.C. sec 2518 (l) (b) (IV) were violated by not naming him in the Attorney General's authorization yet naming him in the order of December 8, 1972.
3. Whether the appellant, DiMatteo's constitutional rights and his rights under Title III of the Omnibus Crime Control and Safe Streets Act of 1968; 18 U.S.C. sec. 2510-2520 were violated by the surreptitious entries of F.B.I. agents into apartment 309 to install, relocate and remove electronic bugs.

4. Whether the appellant, DiMatteo's constitutional rights were violated and his rights under 18 U.S.C. 2518 (8) (a) by the Government's delay in sealing the tapes.

5. Whether the appellant, DiMatteo's constitutional rights and his rights under 18 U.S.C. 2510-2520 were violated by the manner in which electronic surveillance was conducted at apartment 309 in that the terms of the order were not complied with in determining whether one of the persons named in the Order was present before electronic interception was commenced.

6. Whether the appellant, DiMatteo's constitutional rights and rights under 18 U.S.C. 2518 (1) (b) (IV) were violated by not naming him in the order since his identity was known to the Government.

7. Whether the appellant, DiMatteo's rights were violated when electronic surveillance was ordered although customary means had not been fully tried.

8. Whether the appellant, DiMatteo's rights were violated under 18 U.S.C. sec 2518 (8) (a) by not serving him with a copy of the inventory until 89 days after the extension date set by the Court.

9. Whether there was probable cause to include DiMatteo in the authorization and the order of December 8, 1972.

STATEMENT PURSUANT TO RULE 28 (a) (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mischler) rendered on October 15, 1976 after a jury trial, convicting the defendant, Anthony DiMatteo of violating Title 18, United States Code, Sections 1955 and 2. This was Count Four of the Superceding Indictment renumbered for the purposes of the trial to Count Three.

The superceding indictment charged twenty two defendants with violating 18 U. S. Code, Sections 1962 (d), 1963, in Count One which was severed from this trial.

In Count Two, four defendants, Annarumo, D'Avanzo, Seafidi, Voulo and other persons known and unknown were charged with violating 18 U. S. Code, Sections 1955 and 2 from in or about March, 1972 to in or about July, 1972. Verdicts were rendered in favor of Annarumo and D'Avanzo and against Seafidi and Voulo.

In Count Three DiMatteo, Mascitti, Riccardi, Seafidi and Voulo were charged with violating 18 U. S. Code, Sections 1955 and 2 from on or about December 12, 1972 to on or about March 9, 1973. This Count was dismissed by the Court upon the grounds that less than five persons were involved.

Verdict was in favor of Riccardi and against DiMatteo, Mascitti, Scafidi and Voulo.

In Count Four from on or about April 13, 1973 to on or about June 15, 1973 the defendants Annarumo, Carrara, Cassella, DeLuca, DiMatteo, Lotierzo, Sr. Macchirole, Mascitti, Mascuzzio, Napoli, Jr. Napoli, Sr., Radziewicz, Vigorito and Voulo were charged with violating Title 18 U. S. C. Sections 1952 and 2. Verdicts were against Carrara, DeLuca, DiMatteo, Mascitti, Napoli, Jr., Napoli, Sr., Vigorito and in favor of Lotierzo, Mascuzzio and Voulo.

Count Five and Six were severed.

Count Seven which was against all twenty two defendants and covered the time from February 21, 1971 up to and including the date of the superceding indictment charged the defendants with violating Title 18 U. S. Code, Section 371. This Count was dismissed by the Court at the close of the government's case upon the ground of a fatal variance.

The defendant, DiMatteo was sentenced to three year probation.

Richards W. Hannah, Esq. was under the Federal Justice Act assigned by the Court to represent Anthony DiMatteo and was continued as Counsel on appeal.

FACTS

It would require a lengthy narration to cover the evidence presented in this case of over seven thousand pages of testimony during the trial, twenty two defendants, about twelve F. B. I. agents, three experts and other witnesses. There was also over four days of suppression hearings prior to this trial. Therefore, to shorten this brief, DiMatteo will present only the important evidence as it bears upon the issues raised upon his appeal. Most of his points deal with issues of law concerning the electronic surveillance.

In February, 1972, Charles Parsons of the I.P.I. reactivated a Government investigation into gambling in the Williamsburg section of Brooklyn, New York after receiving a tip from the New York City Police Department. (S 22) ¹⁵³ Search warrants were executed against places, vehicles and persons from 1971 to 1973 and evidence of gambling seized. (S 220-234, 239-250, 533, 755, T 1518-20) (A 243-244).

The investigation slowed down during the summer of 1972 but personal surveillance was resumed in September, 1972. ^(A 244) By November 20, 1972 Mr. Barlow and Agent Parsons concluded their investigation had gone as far as it could with the conventional methods which had been employed and that oral electronic surveillance was necessary. ^(A 241, 267) Agent Parsons just prior to November 20, 1972 received the investigation and made notes which he and Mr. Parlow used to draft the application of Mr. Parlow (but which was executed by Robert Del Grosso in his absence) and the affidavit of Agent

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The letter (S) refers to the suppression hearing pages.

The letter (T) refers to the trial transcript pages.

The letter (A) refers to Joint appendix.

The letter (PA) refers to DiMatteo supplemental appendix

Parsons, both to be forwarded to the Attorney General in Washington, D. C. for his approval so that an authorization could be issued to apply to a Federal Judge for an order for oral electronic surveillance at apartment 309 at 8-15-27th Avenue, Astoria, New York.

Agent Parsons set forth in his affidavit, which included the investigation up to November 20, 1972 with one exception of evidence obtained on November 28, 1972 from an informant, the part alleged to have been played by DiMatteo. At this point, it must be noted that the agents presumed that the person they were watching was Pasquale Joseph Rossetti, because he was the registered owner of a red Chevrolet, license number Q. H. 5287 but they subsequently claimed the person they saw was DiMatteo who was using this automobile. (S 298-303) The investigation shows that starting on October 27, 1972 to November 9, 1972 on four occasions a person believed to be Pasquale Joseph Rossetti parked his red Chevrolet Q. H. 5287 automobile near 37-33-76th Street, Queens and was seen either entering or leaving the building and that the agents did not know what apartment he was in; (T 539, 911, 630-632, 1082) (A-256-259) that from November 15, 1972 to November 20, 1972 either automobile Q. H. 5287 was seen parked in the vicinity of 8-15-27th Avenue, Astoria and a person believed to be Rossetti was seen entering or leaving the building or both on four occasions (T 631) (A259-261). Here again the agents never saw him enter a particular apartment (S 289). This was the cut-off in the investigation as it was set forth in the application and affidavit. (A 261)

There was omitted by Agent Parsons from the observation of November 14, 1972 that Q. H. 5287 was followed to 5354 Metropolitan Avenue, Brooklyn where DiMatteo

lived (S 519). There was also omitted from the November 20, 1972 observation that an unknown white male with black hair exited the doorway in the vicinity of 5346 Metropolitan Avenue and who got into Q.H. 5287. Mr. Barlow testified he did not know that DiMatteo lived at this address. (S 521).

However, the surveillance continued and on November 22, 1972 Agent Leisegang reported seeing this automobile at 8-15-27th Avenue. The driver exiting and entering the apartment house and photographs were taken of him. (T 1845) On November 29, 1972 a person believed to be Rossetti exited 8-15-27 Avenue and departed in the car and Agent Clark reported that on this day the license plates on the red Chevrolet were changed to A. Q. 6565. On December 4, 1974 Agent Lahey saw a white male enter 8-15-27th Avenue, Astoria and photographs were taken of the man presumed to be Rossetti. (T 623-628) (T 745) During this period of time the F.B.I. obtained a motor vehicle license check on Q.H. 5287 which it claims was registered in Rossetti's name plus a police department mug shot of Rossetti and his criminal record but no records could be produced to show when this information was obtained or how it was obtained or by whom. (S 303, 304, 282) (T 925) When the license plate change occurred on November 29, 1972, the same motor vehicle check was made and the new owner was DiMatteo. (T 911-916) Again the agents did not know by whom or when the records were checked to obtain the new owner.

S4291
(S 283-285) After obtaining DiMatteo's name, his mug shot (photograph) was obtained. Agent Parsons stated the photographs of DiMatteo and Rossetti were compared the first day the automobile was observed on 76th Street which was October

27, 1972 and the license plates showing DiMatteo were not obtained until November 29, 1972. (S 290) No records were kept by the F. P. I. to show when and by whom (429), this information was obtained. On cross-examination the agents except Agent Lahey testified neither they nor records of the F. P. I. would disclose whether this information was obtained before or after December 8, 1972 when the electronic surveillance started. (S 429) However, all said they recognized the man they saw on 76th Street and at 8-15-27th Avenue as the same man they now knew as DiMatteo by identity. (T 2796) Agent Lahey testified that as he recalled that it was before December 8, 1972 when the electronic surveillance began that DiMatteo was identified as DiMatteo. (T 1043) This is important because then DiMatteo's name should have been in the authorization and the order.

The electronic surveillance recommendation to the Attorney General and the application, affidavit of Agent Parsons and the proposed order were prepared by Mr. Barlow and Agent Parsons. (S 484) The cut off date was November 20, 1972 and nothing which occurred after that date was added to the recommendation. (S 267) On December 1, 1972 Mr. Parlow took the papers to Washington to the Attorney General for his approval. (S 402, 481) There was an objection by the Attorney General to the words "a person believed to be Pasquale Joseph Rossetti" and Rossetti's name was struck from this authorization. (S 485, 486) The Attorney General had the final determination of the application and affidavit. (S 487) On December 8, 1972 when the proposed order was presented to Judge Judd for approval the name Pasquale Joseph Rossetti appeared in the order as not only a person whose oral communications should be

intercepted but also as one of the five named persons who had to be at apartment 309 before electronic interception could be commenced. Agent Parsons did not notice that Rossetti's name was not in the authorization. (S 302) He could not remember any conversation about Rossetti's name being in the order but not in the authorization. (S 301) Judge Judd was not told that Rossetti's name was in the order but not in the Attorney General's authorization when the order was signed. (S 309) Judge Judd was not told that a surreptitiously entry would be made. No sworn testimony was taken before Judge Judd. (S 301) On December 8, 1972 an F. B. I. agent obtained a pass key for apartment 309 from the superintendent of 8-15-27th Avenue, Astoria and surreptitiously entered to install two bugs in the apartment of Phyllis Engert to intercept the conversation of those in the apartment who were named in the order. (S 326) Those named in the order (A239) for interception were Rossetti, Pari Russo, Mustacchio, Voulo and Scafidi. Interestingly Mr. Barlow, who was in charge of the investigation admitted that he did know that Rossetti's name was in the order. The (bugs) oral electronic surveillance started not after it has been established that one of the five persons named in the order were at apartment 309 but when they should have been there judging on the times of their past arrivals. (S 412, 468, 237) It was at this time that surveillance started and the voices were heard and after a period of time the agents sometimes after consultation with each other and listening to other tapes, identified the voice of Anthony DiMatteo and Pari Mascitti and for the first time learned their (DA 140 A-203 A).
names. The discovery ranged from days to weeks, depending on the agent.

Mascitti and DiMatteo were legally in apartment 309 as the evidence set forth on the Point, on Standing shows above. The interceptions developed conversation of a gambling nature and certain names were brought into the picture. During the surveillance the F. B. I. agents again obtained a pass key from the superintendent and surreptitiously entered apartment 309 to relocate the bugs and to remove them or as Parsons states were in the apartment two or three times.

(DA 19A)
(S 332) These entries were without a Court order and without the knowledge or consent of Judge Judd or Judge Weinstein who signed the second order for oral electronic surveillance at apartment 309 on January 15, 1973. (DA 29A-36A) In this order the names of the parties to be intercepted were Barry Russo, Anthony DiMatteo, also known as "Tony Apples"; Rocco Riccardi, also known as "Rocky"; Joseph Simonelli, also known as "Joe Black"; Phyllis Engert, John Doe D and others as yet unknown and one had to be at the apartment before electronic surveillance could start. (DA 17A-19A) The affidavit of Agent Parsons of January 15, 1973 and the application of Robert G. Del Grosso, now state that where the name of Rossetti was mentioned in the previous order of December 8, 1972, the application and affidavit of Parsons, dated January 15, 1973) that the name of the person was DiMatteo (an entirely different individual) (DA 23A-26A)

During the duration of this order conversations of a gambling nature between DiMatteo (DA 26A), and Mascitti were obtained. Subsequently, a third order was granted by Judge Rosling on February 20, 1973 for an interception on the telephones at apartment 309-number 212-932-2708 and at 161-20-91 Street, Howard Beach-number 212-835-1163 and the persons to be intercepted were: Pari Mascitti, Anthony DiMatteo, Eugene Scafidi

Rocco Riccardi, Robert Voulo, Joseph Simonelli, a person answering the telephone number 894-9195 and others as yet unknown. Since DiMatteo and Mascitti were no longer at apartment 309 this tap was not installed at apartment 309.

The next order was signed on April 12, 1973 by Judge Bartels and was for a oral electronic surveillance for 15 days at the Hi-Way Lounge on Napoli, Sr., Napoli, Jr., Martin Casella, DiMatteo, DeLuca, Pascetta and others yet unknown. The order did not provide for surreptitious entry to install, relocate or remove the bugs but Judge Bartels inquired as to how the bugs were to be installed and was told that there would be an entry at night to install them by using a skeleton or pass key. (S 70.71) No order was made to approve this entry and apparently no transcript was made. During the duration of the order F.B.I. agents re-entered to relocate the bugs without a court order on unknown dates. (S 71) This order terminated on April 28, 1973. On May 2, 1973 the Government learned that an important meeting was to be held at the Hi-Way on May 3, 1973 so it appeared before Judge Judd on May 2, 1973 and an order was granted permitting an F.P.I. agent to enter the Hi-Way surreptitiously to recharge the batteries. (S 81) ^(A 303) _A This was granted although no order for oral electronic surveillance was in force.

DiMatteo urges that this order violated his constitutional rights since he was heard on this bug on May 11, 1973. On May 3, 1973 Judge Bartels ordered oral electronic surveillance for 15 days at the Hi-Way Lounge naming Napoli, Sr.; Napoli, Jr.; DeLuca, Voulo; Assaro, male known only as Ray, Bascetta and other yet unknown. There was no provision in this order for surreptitious entry to relocate, remove or recharge the bug. There is testimony by Agent Parsons that F.B.I. agents surreptitiously entered the Hi-Way Lounge three or four times during the life of these orders without a Court order. (S 71) After February, 1973 the evidence

fades as to DiMatteo with the exception that he was observed visiting the Hi-Way Lounge two or three occasions and was intercepted on May 11, 1973 at a meeting of the Hi-Way Lounge in conversation about gambling and his particular assignments. Thereafter, DiMatteo disappears from the investigation, which continues for about two years.

DiMatteo submits that his rights were prejudiced by joining him with 21 others, all of whom were on levels far above his of a part time paid clerk. This was especially true since the conspiracy count covered all the defendants. DiMatteo was included in two substantive counts. The evidence against the other defendants consumed the greater part of the trial and it is submitted that the overflow from this evidence prejudiced his standing before the jury since he was convicted on his one appearance at the Hi-Way Lounge on May 11, 1973.

The Order of December 8, 1972 is of the greatest importance to all the defendants. It is the foundation for all subsequent orders since the evidence obtained was used on the basis for each successive order. The entire case falls if this evidence seized under this order is suppressed. There are many defects in it, which are pointed out in this brief. Wiretapping was formerly forbidden except under exigent circumstances. Then in 1968 it was legalized under stringent conditions. The Government has not only violated DiMatteo constitutional rights (illegal entry) but his rights under the statute permitting wiretapping. As far as the evidence is concerned, the evidence in Count 3 dealing with apartment 309 was far more serious. The Court dismissed this Count because the Government failed to prove five persons were involved. The evidence in Count 5 is based upon his appearance at one meeting on May 11, 1973.

POINT I

DIMATTEO SUBMITS HE HAS
STANDING TO ATTACK THE
ELECTRONIC SURVEILLANCE
ORDER IN APARTMENT 309.

The appellant, Anthony DiMatteo, urges he has standing to suppress the communications obtain by the oral electronic surveillance:

(A) Under his rights under the Fourth Amendment: (B) That he is an aggrieved party under 18 U. S. C. Section 2510 subsection 11 provides that an aggrieved person means a person who was a party to any intercepted wire or oral communications or a person against whom the investigation was directed and (C) That under U. S. C. section 2518, subsection 10, which provides in substance that any aggrieved person in a trial or hearing before any court may move to suppress the contents of any intercepted wire or oral communication or evidence derived herefrom on the ground that (1) the communication was unlawfully intercepted (2) the order of authorization or approval on which it was granted is insufficient on its face, or (3) the interception was not made in conformity with the order of authorization or approval.

The affidavit of Engert submitted in support of Mascitti's motion to suppress and her testimony at the trial established that she was the lessee of apartment 309 at 8-25-27th Avenue, Astoria, New York, that Mascitti and DeMatteo were in the apartment with her knowledge and consent, that both had keys to the apartment, used the telephones in the apartment, brought food into the apartment which she cooked for them and they shared with her, that she took bets to O. T. B. for Mascitti and received payment for the use of the apartment. Engert's relationship with Mascitti was of a

personal nature. Mascitti, DiMatteo and Engert thought they had complete privacy in what they said and did. They did not expect that their conversations were being overheard by means of electronic bugs placed in the apartment and their privacy invaded.

The government evidence supported DiMatteo's position of standing since it showed both Mascitti and DiMatteo entering the building with a key, Mascitti entering Engert's apartment with a key and Mars, the building superintendent's report to Agent Parsons wherein Mars said Mascitti told him upon his inquiry that Engert was his girlfriend. (DA-40A).

These facts establish a special relationship between DeMatteo and the premises which gives him a sufficient possessory interest in apartment 309 to obtain standing plus the fact his conversations were intercepted. (T 1780-1835)

In Katz v. United States, 369 U.S. 347 (1967) the Court reviewed a decision upon a motion based upon the Fourth Amendment which had denied suppression of electronic obtained evidence. A tap had been placed on the outside of a public telephone booth which Katz had used. Katz claimed that the area was a constitutionally protected area; the government argued to the contrary. The Court said that the Fourth Amendment protects people not places. A pertinent quote from the decision of the court is as follows:

"But what he sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxi cab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll.... is surely entitled to assume that the words he utters in the mouthpiece will not be broadcast to the world."

The Court concluded that the trespass theory is no longer controlling and that electronic listening to and recording a person s w ls violated the privacy upon which he justifiably relied and constituted "search and seizure" within the meaning of the Fourth Amendment.

In Jones v. U.S., 362 U.S. 257 (1960), the Court in vacating a judgment of conviction for narcotics where the issue of standing had been raised, stated:

"No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when the fruits are proposed to be used against him.... As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated."

Alderman v. U.S., 394 U.S. 146 (1969) held that only a person whose voice was intercepted or a person on whose premises the interception occurred has standing.

Paker v. U.S., 401 F 2d 958 (C. A. D. C.) aff. 430 F2d 499, cert den 91 S. Ct. 367, 460 U.S. 965 (1968) supports DiMatteo's position. In the Paker case, the appellant argued that he had standing to suppress all recorded conversations in the Black suite, because of his "special" relationship to those premises, i.e., the fact that he had a key, was authorized by the owner to use the suite at anytime and in fact did use it frequently for business meetings and telephoning. After stating that it is now clear that unlawful electronic surveillance violates the Fourth Amendment and in view of the Supreme Court decisions that the protection afforded by the Amendment is not against technical trespass but against the invasion of privacy, the Court said that we think that such a narrow view of standing to suppress unlawfully obtained evidence could

not be justified. Appellant's interest in the Black suite warranted his expectation of freedom from government intrusion. In closing, the Court said that appellant's relationship to and interest in the Black suite made the premises a constitutionally protected area from which he had a right to be free of unconstitutional governmental intrusion, which was sufficient to confer standing upon him.

DiMatteo claims that the F. P. I. illegally entered apartment 309 to install the bug, relocate it and remove it without a court order, which fact had been admitted by the government. He also claims that his other rights had been violated (1) in identification, (2) not naming him, (3) the manner the government conducted the surveillance, (4) the sealing of the papers, and (5) service of inventories.

Chief Judge Mischler's Memorandum of decision, dated October 14, 1976 held that Mascitti, Mustacchio, DiMatteo and Scafidi were without standing to challenge the propriety of the F. P. I.'s entry to install devices in apartment 309 since standing devolves in a defendant only where he is present on the premises at the time the warrant was executed or where he has a proprietary or possessory interest in the quarters searched. ^(A 128-129) This conclusion appears to clash with Alderman v. U. S., 394 U. S., 165 and with the cases cited in this brief. The reason assigned was "That they supplied her with illicit payments only gave them a license to use the premises during the daytime; it did not give them a proprietary interest to challenge nighttime entry." There was no evidence that the use of the premises was limited only to daytime. In fact, both DiMatteo and Mascitti had keys and could enter when they pleased since Engert worked during the day from 9 A. M. to 5 P. M.,

except Sundays and had one day off during the week. The Court rejected DiMatteo's claim that the continuous nature of the electronic surveillance resulting in a seizure of their conversations when they were on the premises conferred standing to challenge the installation of the monitoring device when they were absent.

Baker v. U.S., supra, is in direct opposition to the Court's position. The Supreme Court has not based its recent decision on this ground, but on an invasion of privacy which certainly occurred here.

It is submitted that DiMatteo has standing to attach the electronic surveillance at apartment 309.

POINT II

A GOVERNMENT ATTORNEY MAY NOT
ADD IN AN ORDER FOR ELECTRONIC
SURVEILLANCE THE NAME OF A PERSON
THE ATTORNEY GENERAL HAS STRICKEN
FROM THE AUTHORIZATION AND NOT
APPROVED

DiMatteo urges that the Government is limited to naming in the order the persons approved as targets in the authorization of the Attorney General. To add the name of Pasquale Joseph Rossetti to the order without explanation and say a month later that there was a mistake in identity and the Government meant Anthony DiMatteo is irresponsible since the Government treated the name of Rossetti as DiMatteo in its conduct of the electronic surveillance at apartment 309 as if he had been properly added to the order and approved by the Attorney General.

18 U.S.C., Section 2516 provides that the Attorney General.. may authorize an application to a Federal Judge of competent jurisdiction for, and such Judge may grant in conformity with section 2518.. an order authorizing or approving the wire or oral communications by the Federal Bureau of Investigation.. when such interception may provide or has provided evidence of the violations of certain statutes. The purpose of having the Attorney General pass upon these recommendations was to review the applications as, to form and substance and to control the number of applications for this

type of surveillance to the Courts. As Fred Parlow testified the Attorney General con-

(S 487, D A 110A)
trolled the applications. ^A Section 2518 (l) provides that such application for an order

authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicants' authority to make such an application. Each application shall include the following information:

(b) (IV) the identity of the person, if known committing the offense and whose communication are to be intercepted.

The authority given by the Attorney General was set forth in his authorization in which he identified the person committing the offense and whose communication are to be intercepted. Rossetti and DiMatteo were not named. (D A-1A-2A)

Fred Parlow, the Task Force Attorney, testified that the Office of the Attorney General, to which he submitted his recommendation for electronic surveillance of apartment 309 (bugs) with the proposed order, the application drawn by Mr. Parlow and Agent Parsons, struck out the name of Pasquale Joseph Rossetti and omitted it from the authorization and authorizing letter. (S 484) (D. A 107A-109A).

When the proposed order with the application, affidavit and authorization and authorizing letter were presented to Judge Judd for approval on December 8, 1972, Rossetti's name appeared in the Order as one of the persons involved and one to be (A 301, A 218)
intercepted. No transcript was made at this hearing. ^A Mr. Parlow testified that Parsons

nothing was said about the Order and no explanation was offered or requested as to
(S 301, A 218)
why Rossetti's name appeared in the Order and not in the authorization. If there had
been some reason to make this change Judge Judd should have been informed. Since
this is a Government application under the direct control of the Attorney General
Rossetti's name should never have been included in the Order after being stricken
from the authorization and to insert it was contrary to the authority given by the
Attorney General and prejudicial to Rossetti's and DiMatteo's. rights under 18 U. S. C.
sections 2516 and 2518 (b) (IV). (S 483-486, 298-303)

The error is even more blatant when the Government in Agent Parson's affidavit came forward in the application for another order for electronic surveillance at apartment 309 on January 15, 1973 saying that we meant Anthony DiMatteo and not Rossetti in our order of December 8, 1972 without any adequate explanation as to the error in the order. (D A 264),

In the second application Anthony DiMatteo was named properly in this authorization and the order of January 15, 1973.

The presence of Rossetti's name is important (1) because the Government treated it as DiMatteo; the Government mentally substituted DiMatteo in the Order for Rossetti, (2) this was done without obtaining a further authorization or Court Order, (3) the order provided that certain persons had to be present at apartment 309 before monitoring could start; this added another person not approved, (4) if Rossetti was improperly named in the Order, how could DiMatteo be substituted, and (5) this wholly gratuitous substitution created uncertainty as to the persons to be intercepted and present an

manner of interception.

As the statute says and the cases hold the utmost care must be employed in applications of this type and such an error as this should result in a suppression of the entire Order or at least all evidence obtained against Anthony DiMatteo.

Chief Judge Mischler stated in his decision that it did not really matter what names was applied to DiMatteo since the Government knew the particular person who was meant. The statute requires identification not substitution. This serious error was created by the Government and affects the order and its execution and prejudiced DiMatteo's constitutional rights and his rights under sections 2516 and 2518.

Suppression should be granted because of this serious error as to DiMatteo.

POINT III

DI MATTEO'S RIGHTS WERE VIOLATED
BY THE SURREPTITIOUS ENTRY OF
GOVERNMENT AGENTS TO INSTALL
RELOCATE AND REMOVE ELECTRONIC
EQUIPMENT IN APARTMENT 309 AND
IN HI-WAY LOUNGE

This issue is one of first impression as to private premises.

DiMatteo urges that the F. B. I. agents violated his constitutional rights and his rights under 18 U. S. C. 2518 when they surreptitiously entered apartment 309 where he was legally present, by means of a pass key obtained from the superintendent and installed, relocated and removed the electronic bugs on two or three occasions; all unknown to the lessee, Phyllis Engert, DiMatteo and Mascitti and without their knowledge or consent (s. ~~etc.~~ 319. 320).

The IV Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

DiMatteo submits his rights were violated since there was no warrant issued which permitted the F. P. I. agents to enter apartment 309 to install the bugs and that the Orders of interception lacked the particulars requirement of a warrant, i. e. time of execution, means of entry, et cetera. Furthermore, that even if the Orders of December 8, 1972 and January 15, 1973 were construed to be warrants that they

were defective since they did not conform to the requirements of a warrant and really were so broad as to be a hunting license.

The Task Force's recommendation to the Attorney General for the initial interception had included the name of Pasquale Joseph Rossetti as one of the persons involved and to be intercepted.

The Attorney General pursuant to 18 U. S. C. 2518 approved on December 7, 1972 an authorization recommended by the Task Force in Brooklyn, New York to intercept oral communications of Joseph Mustacchio, Luigi Scafidi, a male known only as Parry Russo, John Doe and others as yet unknown alleged to be conducting a gambling operation at 8-15-27th Avenue, Astoria, New York in apartment 309, but disapproved Pasquale Joseph Rossetti.

On December 8, 1972 the Government by Mr. Del Grossi and Agent Parsons presented the application, the affidavit, the authorization for the electronic surveillance and the authorizing letter and an order to Judge Orin Judd for his approval. The order authorized the interception of the oral communications of Pasquale Joseph Rossetti (not included in the authorization), Joseph Mustacchio, Luigi Scafidi, also known as Gene, males known only as Parry Russo and John Doe and others as yet unknown at apartment 309, 8-15-27th Avenue, Astoria, New York, for a period of 15 days from the date of this order provided that electronic surveillance of the oral communications of the above named subjects shall occur only when it has been determined that at least one of the above named subjects is at the above described premises. Fred Barlow, Esq., was ordered to provide the Court with a report on the fifth and

tenth days following the date of the order showing what progress was made and the need for continued interception.

There was no provision in the order as to the manner and means of entry, as to the number of bugs to be installed or the manner, time or place of the installation or the re-entries to relocate or remove the bug. Neither the application of Robert Del Crosso, the Special Attorney, nor the affidavit of Charles J. Parson's set out the manner of installation nor sought the directions of the Court on these legal questions of entry.

This matter was not brought up or discussed with Judge Judd at the time he signed the order on December 8, 1972 at 10 A. M. The transcript of the suppression hearing shows that no transcript was taken before Judge Judd on said December 8, 1972. (II. M. 301).

In order to install the "bugs" in the living room and bedroom, an F. B. I. agent obtained a pass key from the superintendent of the building and surreptitiously entered when no one was present and without the knowledge and consent of the lessee, Phyllis Engert, and did place the bugs. Agents subsequently entered the apartment on at least 2 or 3 occasions to either relocate the bugs for better reception and to remove them accordingly to Agent Parsons, who was in charge of the investigation. (s. 332).

The order provided that progress reports were to be submitted to Judge Judd on the fifth and tenth days of the interception, reporting the progress of the oral surveillance. The first report was given to Judge Judd on December 18, 1972 and set forth that on December 8, 1972 the installation of the monitoring equipment was completed at 8:05 P. M. Nothing was said as to how entry into the apartment was obtained. (DA 29A). Subsequently the agents re-entered to relocate the bug for better reception, but this

was not reported to Judge Judd in the reports submitted on December 19, 1972. (DA 3A-1(A),

Obviously Judge Judd was totally unaware of how the bugs were installed.

On January 15, 1973 the Government applied to Judge Weinstein for an order for electronic oral surveillance for apartment 309 naming in the authorization, dated January 12, 1973, Barry Russo, Anthony DiMatteo, also known as "Tony Apples", Rocco Riccardi, also known as "Rocky", Joseph Simonelli, also known as "Joe Black", Phyllis Engert, an individual referred to as John Doe and others as yet unknown persons. The period of the authorization was for 15 days, except Sundays, from the date of the order. (PA.17A-28A),

The interception was limited to only when it was determined that at least one of the aforementioned persons were at the described premises. Reports were to be made to the Court on the fifth and tenth days following the date of the order.

Here again there was no provision in the order for entry to install the devices, relocate or remove the bugs. The question was never discussed with Judge Weinstein according to the transcripts at the suppression hearing.

Parsons had testified at the suppression hearing that surreptitious entries had been made two or three times to apartment 309. The reports to Judge Weinstein only covered the period to January 19, 1973 and contained no statements with respect to entry into apartment 309 to install, relocate or remove the bugs. (DA.29A-34A)

In Miller v. U.S., 357 U.S. 301 (1958) the Court traced the rights of the police to break into a private home without a warrant. Even with a warrant they must state their authority and their purpose before any breaking. This approach was incorporated in 18 U.S.C. sec. 3109. Since the federal officers in Miller v. U.S. had no warrant and

failed to announce themselves properly the seized evidence was suppressed. In its opinion, the Court said:

"However much in a particular case, insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying as tradition embedded in Anglo-American law, has declared in 18 U.S.C. sec. 3109 the reverence of the law for the individual's right at privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against invasion of the house."

Starting with this premise, the F.B.I. agents required a warrant or order similar in all respects to a warrant before they could enter apartment 309 or the Hi-Way Lounge.

In Judge Mischler's decision he seemed to draw a distinction between a private home or apartment and business premises. In the recent case of C. M. Leasing v. United States, No 75-235, decided January 12, 1977 the Court said:

"The respondents do not contend that business premises are not protected by the Fourth Amendment. Such a proposition could not be defended in light of this Court's clear holdings to the contrary." (cases cited).

Therefore, premises used for business fall in the same class as private homes.

There are no cases where surreptitious entry without a Court Order has been upheld in electronic surveillance cases. There are two where it was done in business premises under Court order in addition to the order for the electronic surveillance.

In U.S. v. Agrusa, 541 F 2d 691 (C.A. 8th 1976), the defendant raised on appeal the issue of illegal entry in that certain wire and oral communications were intercepted by the Government on his business premises in purported compliance with the provisions

of Title III of the Omnibus Crime Safe and Safe Street Act of 1968, 18 U.S.C. sec 2510 and other applicable law. The Government had submitted the usual papers for an interception order. The order authorized the Government "to make secret and, if necessary, forcible entry at any time of day or night which is least likely to jeopardize the security of this investigation, upon the premises, in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises." The parties stipulated that "the bug... was placed in the defendant's body shop, by the Government agent, without the defendant's permission after regular business hours and at a time when the body shop was closed and locked." The defendant urged that this activity, with or without Court approval, is neither permissible under the Fourth Amendment nor authorized under applicable statutory and common law.

The Court said in a footnote:

"13. We do not decide what result obtains if the officers act without express Court authorization to break and enter) although with Court authorization to intercept). We are certain, however, that the resolution becomes much more difficult in that event, and we commend the procedure employed here to law enforcement officers in the future."

After an exhaustive examination of 18 U.S.C. sec. 3109 which requires an announcement and knock prior to entry and whether such procedure would justify the belief that the sought for evidence would be destroyed, the Court held that Law enforcement officer's may without knock or announcement, break and enter business premises which are vacant at the time of entry in order to install an electronic

surveillance device provided the surveillance activity is itself pursuant to Court authorization, based upon probable cause and otherwise in compliance with Title III. The Court expressed no view on the result which obtained when one or more of these factual variants is altered. In a strong dissent Judge Lay questioned whether the effective enforcement of our Criminal Law requires Government agents to break and enter private premises, like common burglars, to plant eavesdropping devices. Judge Lay pointed out (as DiMatteo's counsel did) that there were several methods of electronic surveillance available which might have been used to intercept the conversations which did not require an entry on the premises i.e. a pen register and/or a telephone tap. Judge Lay pointed out that even under a Court Order forcible entry should be limited to exigent circumstances. Here no exigent circumstances were proved by the Government for entry into apartment 309.

In U. S. v. Ford, 414 Fed Supp. 879 (D. C. -1976), the Court approved the installation of bugs for electronic surveillance in a store by means of a ruse i.e. a bomb scare. The first effort on September 5th, 1975 was unsuccessful and it was repeated on September 10th, 1975 under another Court Order. The Order provided that "Entry and Re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem." The decision of the Court was (1) that while the statute does not bar the use of such devices by the police, Congress must be taken at least to have granted or implicitly recognized the general power of the Court to authorize a covert and possibly otherwise illegal entry to place a "bug"

under some circumstances (2) that the Judge knew from conversation in advance of the "ruse" and the mal-functioning and thereafter discussed the re-entry and approved it, (3) that a warrant must be specific and is not a general hunting license so where more than one entry is involved each intrusion must be treated formally and approved in advance so the Judge can supervise when and how the entry is to be accomplished since a separate determination of probable cause and reasonableness is required as to each intrusion upon private premises, (4) that the authorization did not limit the number of entries nor did it specify either the general time or manner of entry; therefore, it was far too sweeping, (5) that electronic surveillance must be limited to the strictest adherence to constitutional and statutory standards and the police cannot be left with virtually unrestrained discretion in installing a surreptitious listening device, and (6) that Congress expects warrants for electronic surveillance to be narrowly drawn to fit the individual case.

These cases support DiMatteo's position for even where business premises are involved there must be a Court Order for entry and the Court must be specific as to manner, time and means of entry. In the case as that we are dealing with an occupied apartment, a home, in which case, the law is even more stringent.

Judge Mischler adopted the theory of implicit authority in the Court Order for entry but even if this theory is accepted the Order lacks the limitations so necessary as to means, manner, time and times of entry, so that it was really a

general warrant with no controls placed upon the Government agents as Judge Cesell pointed in U.S. v. Ford, Supra.

The same arguments can be advanced as to Judge Judd's Order of May 2nd, 1973 wherein he gave authorization "to enter the subject premises the night of May 2/3, 1973 to effect any extension of Judge Partel's Order of April 12th, 1973." This Order had expired on April 28th, 1973. It is urged that the Court has no jurisdiction to grant an Order for entry to recharge the bugs placed in the Hi-Way Lounge pursuant to Judge Bartel's of April 12th, 1973.

The arguments set forth above are equally applicable to the Order of Judge Bartels, dated April 2, 1973 wherein he granted authorization for electronic surveillance at the Hi-Way Lounge but the Order contained no authorization for entry to install the bug, relocate or remove it. However, Judge Partels did inquire at the time he signed the Order when the bug was to be installed and how, so he was aware that there would be a surreptitious entry. In the report of April 23, 1973 to him it was stated that on April 12, 1973 that equipment was relocated for better reception. This was done without consulting Judge Partels and without an Order. The taint of this Order would extend to the Order of May 3, 1973 since the same bug was used in both orders.

It is interesting to note that the New York Criminal Procedures Law, Article 700, Section 700.30 provides that an eavesdropping Order must contain an express authorization to make a secret entry upon a private place or premises to install an eavesdropping device, if such entry is needed to execute the warrant.

Therefore, since the electronic interception on apartment 309 and on Hi-Way I and II were all obtained by unlawful entries, all conversation should be suppressed. Moreover, since each Order was based upon evidences intercepted by the previous Order the application to suppress all Orders should be granted since they are products of the poisonous tree. The evidence intercepted by the pen register of December 20, 1972 and all pen register orders thereafter should also be suppressed.

The appellant, DiMatteo also joins and adapts these arguments in the briefs of Bari Mascitti and James Napoli, Sr. on this point.

POINT IV

THE GOVERNMENT'S FAILURE TO SEAL
THE TAPES 'IMMEDIATELY' AS THE
STATUTE REQUIRES REQUIRES SUPPRESSION

The obvious purpose of Congress when it enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. sec 2510 et. seq. was to prescribe specific and detailed procedures to ensure careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits.

Section 2518 (8) (a) of 18 U.S.C. which deals with the sealing of the tapes provides:

"... Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his direction..."

The obvious purpose of this part of Section 2518 (8) (a) was to protect the integrity of the tapes, so that they could not be tampered with by erasures, changes and additions. It is claimed that this can be done by experts and the alteration cannot be detected.

The Government failed to comply with this section of the statute especially as to apartment 309I and the defendant DiMatteo sought suppression, which the trial judge denied.

The tapes of December 8, 1972 referred to as apartment 309I which was for 15 days and included Sundays expired on December 23, 1972. It was sealed on January 15, 1973-a delay of 23 days. Fred Barlow, who was in charge of the investigation except from December 8 to 15, 1972 testified the reason for the delay was: (1) that the

(DA 101A)

"immediately" requirement slipped his mind (s.m. 462) (2) that he had not read the

statute, (3) that he was preparing for two trials and seeing witnesses, (4) that it

(DA 102A)

was the week before Christmas (s.m. 463), (5) that it was not intentional (s.m. 464) (DA 103A).

(6) that he had no discussion with Parsons in the interim (s.m. 464), (7) that he never

diaried the matter for his attention, (8) that no judge nor Mr. Dillon, head of the Task

Force, ever called him to ask if the tapes had been sealed and (9) cannot remember

*(S 461-465)

calendaring for sealing or other steps.* Parsons testified that he had received the tapes

either at the end of each day or that the agent would bring it to him the next morning and

that except for duplicating it, which was done by a clerical worker at the beginning

(s.m. p. 77-79), Parsons duplicated the tapes himself which required about ten minutes

(s.m. 112). Parsons testified as to custody, namely, that he placed the tapes in a

locked cabinet in his office and only he had the key except if he went out of town he gave

*(S 495)

the key to another agent.* He stated that Fred Barlow told him to bring over the tapes

for sealing when the application for the next interception was to be made, which was on

January 15, 1973. At that time Del Grosso appeared with Parsons, as Parlow's presence

was not necessary (s.m. 225) (S.H.p. 77).

A schedule of the various orders is:

Schedule of Sealings

<u>Order</u>	<u>Dates Issued</u>	<u>Date Expirations</u>	<u>Date Sealed</u>	<u>Delay</u>
309 I	12/8/72	*12/23/72 (Friday)	1/16/73	24 days
309 II	1/15/73	2/1/73 (Thursday)	2/5/73	4 days
309 III	2/20/73	3/9/73 (Friday)	3/16/73	7 days
Hi-Way I	4/12/73	4/30/73 (Monday)	5/3/73	3 days
Hi-Way II	5/3/73	5/21/73 (Monday)	5/24/73	3 days

*Surveillance terminated on Thursday, December 22, 1972

There is no merit to the possible claim that apartment 309 II and 309 II are extension orders since (1) the orders did not set forth such a statement and (2) Fred Barlow testified that the Attorney General's office treated them as original orders and struck out the words "continuing' from the order, application and affidavit before the papers were returned to New York (s. ~~pt.~~ 494). Therefore, the Government cannot now claim that these were extension orders and the time for sealing was extended until the expiration date of the last order on apartment 309. Moreover, if the Government's contention is accepted, the tapes of apartment 309 I would not have been sealed until March 9, 1973 a period of about two and one half months and the tapes on apartment 309 II-a period of about five weeks. Consider the interval between the expiration of apartment 309 I and the start of apartment 309 II-a period of about 3 weeks and a similar period between apartment 309 II and apartment 309 III. If this argument is accepted, this important safeguard of sealing could be postponed indefinitely.

This Court in U.S. v. Gigante 538 F2d 502 (2d Cir) set forth certain principles: that immediate sealing is an integral part of this statutory scheme and was to insure that accurate records were kept under continuous judicial scrutiny. The Court rejected the Government's "satisfactory explanation" theory and that a belated sealing ends all further inquiry into the adequacy of the sealing and custody of the fruits. At the time the tapes were sealed, without a hearing, there was no judicial inquiry into possible alteration of the tapes. The Court suppressed the tapes due to the extensive delay in complying with the sealing requirement and no satisfactory explanation.

In U.S. v. Ricco, 421 Fed. Supp. 401 (1976) Judge Lasker suppressed where there

was an unexplained delay of two weeks.

In the instant case there is a delay of twenty-three days in sealing "apartment 309 I" and certainly the explanation given by Fred Parlow is not a satisfactory one-one which should be accepted as an excuse for failure to comply with this important section of 18 U.S.C. 2518 (8) (a).

Since apartraent 309 II and 309 III are based upon the information obtained in apartment 309 I, all interception after 309 I-meaning 309 II and 309 III should be suppressed: in addition, the information intercepts under the pen register order granted by Judge Judd on December 20, 1972 which was granted based upon information gathered under the intercept of 309 I should also be suppressed.

POINT V

PROVISIONS OF THE ORDERS OF DECEMBER
8TH, 1972 AND JANUARY 15, 1973 REQUIRING
THAT CERTAIN PERSONS MUST BE AT THE
APARTMENT AT THE TIME OF INTERCEPTION
WERE NOT COMPLIED WITH BY THE GOVERNMENT
AGENTS

The Order of December 8th, 1972 provided:

"That electronic surveillance of the oral communication of the above named subjects shall occur only where it has been determined that at least one of the above named subjects is at the above described premises."

"The above described premises" is apartment 309. The named persons in the Order of December 8th, 1972 were: Pasquale Joseph Rossetti, Joseph Mustacchio, Luigi Scafidi, a male known only as Harry Russo and John Doe and others as yet unknown. Rossetti was not named in the authorization of the Attorney General yet appeared in the Order.

DiMatteo urges that assuming he was correctly included in the Order of December 8th, 1972 that the Government failed to comply with the important provision of both the Orders of December 8th, 1972 and January 15th, 1973 since there is no testimony or evidence that any of the five named persons were at apartment 309. Concededly there were

no agents on the third floor at anytime doing surveillance on this requirement of the Order.

Counsel for DiMatteo objected that there was no foundation that Mascitti or DiMatteo or any of the others named were at apartment 309 before the interception began. (s. m. 3095).

Premises 8-15-27th Avenue is a large apartment house with fifty or more apartments and with entrances on all sides. Fred Farlow, Esq. testified that he instructed Parsons to "Make sure from him that the F. F. I. agents would have some means of

knowing that one of the named subjects were going to be in the premises before monitoring
[S 41Y, DA 84A-86A)
would commence. It could be expected from the facts that Mascitti and DiMatteo would

be in the apartment between 2:30 and 3:00 P. M. every afternoon and leave at 5:00 P. M.

(s. m. 237
R 412) (DA 419, 38A)

Agent Parsons sought to show compliance with this part of the Order by showing: "generally, someone would observe them going into the apartment house-they were like clockwork-DiMatteo arrived at 3:00 P. M.-then 10 to 15 minutes later with a couple of exceptions Barry-so there wasn't much of a question as to when they were on the premises. (s. m. 237
R 381) (DA 38A)

The monitoring agents were in a building across the street and all testified that they could not see 8-15-27th Avenue from the building in which they were monitoring. They would have to depend on an agent who could see the apartment house to know who entered and left the building, but there was no one to advise them who entered apartment 309 or was present therein. (S 260, 322)

The electronic surveillance logs show that the bugs were turned on at certain times each day rather than when it was established that one of the persons named in the Order was present at apartment 309 (DA 140A-203A).

An inspection of the monitoring logs on 309 I from December 8th, 1972 to December 22nd, 1972 shows no entry by the monitoring agent that he had been advised (DAIA-11A) as to who and when a named person entered the apartment 309 or this building. The same inspection on the logs for 309 I shows just one entry by a monitoring agent that he had been advised that on January 16th, 1973 that Apples (DiMatteo) had entered the apartment house and he then started monitoring (PA 29A-34A).

Every day during 309 I the logs of the monitoring agents merely state "MSOR" instituted without any statement of whether one of the named persons was at apartment 309.

The physical surveillance logs of the agents from December 8th, 1972 to December 22nd, 1972 during the 309 I tap show that agent Leisegang saw on December 9th, 1972 the driver of the red Chevrolet-license A. G. 6565 believed to be a "Tony"- entered 8-15-27th Avenue and on December 15th and December 19th, 1972 saw Anthony DiMatteo enter 8-15-27th Avenue by front door using a key. There is no statement that he reported these observations to the monitors. Agent Swenk saw no one on December 16th, 1972. Only once on January 16th, 1972 does an agent testify that during 309 II tapes while he was monitoring was he told that one of the named persons had entered the building much less apartment 309.

All the monitoring agents identified the voices at different times; Agent Hendickson on December 9th, 1972, Agent Leisegang on December 11th, 1972 knew DiMatteo's voice because he was addressed as "apples", Agent Mitchell on December 11th, 1972 could not identify DiMatteo's voice but knew it a few days later when it was transcribed (T 2922) Agent Queener on December 12th, 1972 identified no person, Agent Swenk did not know DiMatteo's voice

(T 3095-3104)

until 30 days after December 12th, 1972 Agent Leahy on December 14, 1972 did not identify DiMatteo's voice until he listened to other tapes and Agent Heany on December 15th, 1972 did not know DiMatteo's voice until about a week later. All the agents could not identify the voices they heard as persons named in the Order until some time after they started monitoring.

If the government position is that Mascitti and DiMatteo were in apartment 309 it fails because the agents admitted they did not know who was there and could not identify the voices until some time later.

The surveillance was only on the front door of the apartment and as cross examination developed there were many entrances through which persons could have entered and gone to apartment 309 and left without the agents on the street knowing or the monitoring agents.

The issue is whether the agents must prove that one of the named persons was at apartment 309 before the monitoring could begin. The Government urges that based upon a few past observations as to the time DiMatteo and Mascitti arrived, it could infer that such conduct would continue and start the interceptions without the monitors being told they were at apartment 309.

Fred Barlow told Agent Parsons this timing could be expected. Agent Parsons based his compliance in that they were generally observed entering-there wasn't much of a question as to when they were in the premises. Expectation and "much of a question" in the minds of Mr. Barlow and Agent Parsons are not a compliance with the Court's Order-both are pure guesswork. Inasmuch as electronic surveillance is conducted

under Court supervision and Congress has imposed strict provisions upon the Government, it is submitted that the Government has not complied with the terms of the Orders for apartment 309 I and 309 II.

It is interesting to note that when the government conducted the surveillance at the Hi-Way Lounge that the agents on the street notified the monitoring agent as to who was entering and leaving the Hi-Way and many times photographed them.

It is urged that the Government failed to comply with the terms of the Orders in apartment 309 especially 309 I and II. Therefore, the evidence gathered under these Orders should be suppressed as the Government did not comply with the terms of the Order.

POINT VI

18 U.S.C. SECTION 2518 WAS NOT
COMPLIED WITH SINCE DIMATTFO'S
IDENTITY WAS KNOWN TO THE
GOVERNMENT. DIMATTEO SHOULD
HAVE BEEN NAMED IN THE ORDER
OF DECEMBER 8th, 1972

In the recent case of U.S. v. Donovan, U.S. No. 75-212, decided January 18, 1977. The Criminal Law Reporter, volume 20 No. 15, the Supreme Court was presented with the issue of what persons must be named under section 18 U.S.C. 2518 (l) (b) (IV) and said:

"We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone."

While the Supreme Court uses the word "name", the statute, 18 U.S.C. section 2518, (l) (a) (IV) provides that "the identity of the person, if known, committing the offense and whose communications are to be intercepted" shall be included in each application for an order.

The word "identify" is broader than the word "name" and the draftmen of the application and affidavit could have used a description of DiMatteo, which concededly the agents knew if they did not know his name.

DiMatteo falls within this class of persons and the issue goes to his identification.

DiMatteo urges that the Government knew him by name or by sight and physical description and should have included him in the recommendation to the Attorney General

and in the order of December 8, 1972. The fact that Rossetti was included in the order evidences that the Government believed he came within the statute.

The issue was whether DiMatteo was known to the F. B. I. before December 8, 1972 when the order was signed. If so, he should have been identified in it.

The testimony of Agent Lahey at the trial definitely establishes such knowledge.

He was asked by Mr. Barlow:

"Q. Can you tell us whether it was before or after the electronic surveillance began in December, 1972 when you identified DiMatteo as DiMatteo?

A. As I recall it was before the electronic surveillance began." (T.S. M. p 1043).

The other F. B. I. agents, who did the physical surveillance testified that they did not know DiMatteo's name until after December 8, 1972 when the bugging started. (2) All claimed they knew DiMatteo by his appearance. Rossetti's name was obtained from a motor vehicle license check showing he was the owner of automobile license number Q. H. 5287. (3) The F. B. I. then obtained a "mug" shot of Rossetti and his criminal record (S. H. M. p 523). Mr. Barlow testified that he had a conversation about Rossetti with Agent Parsons but could not recall the exact date and Parsons told him Rossetti lived at 500 Metropolitan Avenue, but no one checked it. (S. H. M. p 510).

This evidence is in Agent Parsons affidavit prepared on about November 20, 1972 and submitted to the Attorney General on December 1, 1972 and to the Court on December 8, 1972. On November 28, 1972 Agent Clark noticed that the

(2) Hendrickson (T.S. M. p 2796), Queener (T.S. M. p 539-40)

(3) Parsons, (T.S. M. p 303), Mitchell (T.S. M. p 424)



red Chevrolet, which formerly had Q. H. 5287 plates now had plates A.Q. 6565.

A license check showed the registration to be in the name of DiMatteo (S. H. M. p 523).

The F. B. I. then obtained a mug shot of DiMatteo (S. H. M. p 523). Meanwhile the F. B. I. had taken photographs of the persons entering 8-15-27th Avenue, Astoria on November 22, 1972 and December 4, 1972 which were of DiMatteo. (T. S. M. p 623-634, Cov.

Ex. 148-151, Cov. Ex. 288 A & B) Agent Parsons testified that he discovered Rossetti was DeMatteo between Christmas and New Years, 1972 (T. S. M. p 523). This is hard to accept since Agent Parsons swore in an affidavit dated December 16, 1972 in an order for a pen register that there were intercept daily between Bari Russo and DiMatteo except on December 16, 1972 (S. M. p 523) referring to the interceptions at apartment 309. On November 14, 1972 Agents saw the red Chevrolet Q. H. 5287 parked in front of 5346 Metropolitan Avenue, the home address of DiMatteo and later the same day another agent saw a man fitting DiMatteo's description exit from the building and drive away in Q. H. 5287. The agent did not pursue this investigation. It is common knowledge that law enforcement agencies can determine the licensed owner of an automobile within minutes by a telephone call to the Police Department or the Motor Vehicle Bureau. Did the F. B. I. agents make such a call to establish the new owner of A.Q. 6565 on November 28, 1972? It was registered in the name of DiMatteo.

Mr. Barlow was asked if Agent Parsons had told him that the red Chevrolet license No. Q. H. 5287 had been parked in front of 5354 Metropolitan Avenue on November 14, 1972 and if he knew that DiMatteo lived there and whether Agent Parsons had told him that new license plates had been placed on the red Chevrolet on November 28, 1972.



to which Mr. Parlow replied he could not remember. Of course, further investigation would have disclosed DiMatteo's true identity. Mr. Parlow states that it was between 3 to 5 days into the interception before he knew that the identity of Rossetti was DiMatteo. (S.H.M. p 521). This being so although the F.B.I. had photographs of DiMatteo since November 22, 1972 and other information. The cross-examination of the F.B.I. agents developed that no one knew who obtained this information or when. There were no F.B.I. records to show it. How can it be that this important step was not recorded? Why was there not a report to definitely establish when Rossetti became DiMatteo? Was it because Agent Parsons only brought notes up to November 20, 1972 to Mr. Barlow to help prepare the papers for the order for the surveillance? Why then destroyed these notes? Moreover, why limit the content of the papers to November 20, 1972, when important development occurred after that date. There was a period of time from November 20, 1972 to December 7, 1972 when the papers could have been brought up to date as to DiMatteo. Reference to Agent Parsons' affidavit page 25A shows it was changed to add in an informer's new information given on November 28, 1972.

It is submitted that the reason DiMatteo's name was not in the papers instead of Rossetti was because Agent Clark's lead was not followed up promptly. The Government should be held to a high degree of care in cases of oral electronic surveillance of this type. In U.S. v. Chiarizio (C.A. 2d) -decided ____ F2d ____. November 11, 1975 this Court said:

"Of Course, we would be extremely concerned if it became a common practice for Government agents to justify in retrospect the names omitted from wiretap applications on the ground that Government agents had forgotten or ignored important evidence in the Government's possession."

Summed up, can the Government sit back and not pursue leads promptly?

One agent says the Government knew of DiMatteo and others that they knew him by physical appearance but not by name. Certainly a physical description in the absence of the name with some identifying facts, i.e. as the person driving automobile licensed A. Q. 6565 and Q.H. 5287 at certain times and in entering 8-15-27th Avenue, Astoria would be sufficient. The lack of written records handicapped establishing whether the facts were as Agent Lahey states or not. Agent Parsons states he met with the agents daily and Mr. Barlow says he was advised daily of the results.

It is submitted that DiMatteo has raised serious issues and that Agent Lahey's testimony is more credible than the other agents and should be accepted.

DiMatteo submits that this error in not identifying requires suppression of all evidence as to him.

In U.S. v. Donovan, supra, the Court enumerated when suppression was indicated for failure to comply with section 2518 (1) (b) (IV) as set forth in section 2518 (10) (a) which are:

- "(i) The communication was unlawfully intercepted;
- (ii) The order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) The interception was not made in conformity with the order of authorization or approval."

The Court pointed out that there was no basis to suggest that in this case that the authorization orders are basically insufficient or that the interceptions were not conducted in conformity with the orders. Thus only section 2518 (10) (a) (i) was relevant: were the communications "unlawfully intercepted" given the violations of section 2518 (1) (b) (IV). Suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." In concluding the Court said "we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements."

In DiMatteo's case all three provisions of section 2518 (10) (a) which trigger suppression are present (1) the communications were unlawfully intercepted because of the unlawful entry into apartment 309 and the Hi-Way Lounge to install the bugs for the electronic surveillance. (2) the inclusion of a name not approved by the Attorney General (Rossetti) in his authorization in the Order of Inception was insufficient on its face, since it exceeded the authority granted by the Attorney General and furthermore to substitute the name of DiMatteo for Rossetti was not within the authorization or approval of either the Attorney General or the Court. (3) that the interceptions were not made in conformity with the Order of authorization or approval since the interception were commenced before it was established that one of the person required to be in apartment 309 was present and if Rossetti was properly

named in the authorization there is no proof that he was ever in apartment 309 when the interception was started, in which case there could only be interception when one of the other named was present.

It is submitted that not only was the proper identification important but it went to the very heart of the order because part of the authority to commence the interception depended upon the presence of certain named persons in apartment 309. The issuing Judge depended upon a proper identification in setting the conditions of the order.

It is further submitted that the Government had important leads to establish DiMatteo identity: surveillance, photographs of him on November 22, 1972 and December 4, 1972, a photograph (mug shot), two surveillances when the automobile was parked in front of his home at 5354 Metropolitan Avenue on November 14, 1972 and November 20, 1972 and change of license plates on the automobile on November 29, 1972 yet failed to establish the identity of this important target. It certainly was not because there was not time to add it to the application to the Attorney General since information obtained from an informer on November 28, 1972 was added. Was it forgotten or ignored deliberately? It would appear to be so.

Therefore, suppression of all evidence obtained against DiMatteo by electronic surveillance at apartment 309 should be suppressed and at Hi-Way Lounge I and II because it was the fruit of the poisonous tree.

POINT VII

NORMAL INVESTIGATIVE PROCEDURES
SHOULD HAVE BEEN TRIED AND PROVEN
INEFFECTIVE BEFORE ELECTRONIC SURVEILLANCE
WAS ORDERED

Agent Parsons' affidavit and the application of Attorney Del Grosso do not lay a proper basis for ordering electronic surveillance especially the use of bugs which constitute a complete invasion of one's privacy.

Attorney Del Grosso's application adds nothing to Agent Parsons' affidavit factually. The grounds for granting electronic surveillance must be found within the four corners of Agent Parsons' affidavit. The statute 18 U.S.C. section 2518 (1) (b) provides that each application for an order authorizing or approving the interception of oral communication shall be made under oath...and shall include a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including...full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. (U.S. v. Anderson, 453 F2d 174). There is also the question of whether the facts are stale. Starting on May 1, 1972 Agent Parsons sets forth that three search warrants were executed at two premises and one on an automobile

where gambling equipment seized, that the Agents obtained statements from Mustacchio and Martin Griffin, Jr. that they were running a bank, that in September, 1972 physical surveillance was started on Mustacchio, Bari Russo, Riccardi and a number of unknowns who met at various places at night, on occasion one of them was carrying a brown paper bag, that trash was recovered from a trash can where Barry Russo placed it which turned out to be gambling material, that certain automobiles were parked in front of certain premises in various parts of the city which the subjects entered and left and that certain of the persons were identified by the license plates on the automobiles they used. Agent Parsons then reconstructs his version of how a gambling business is conducted especially as to time and seeks to place the persons under surveillance within ~~his~~ time schedule which Agent Parsons claims is numbers gambling based on horse racing. As far as DiMatteo is concerned there is no proof, just suspicion that he did anything illegal up to November 20, 1972 when the affidavit was executed. All the evidence against him was that an automobile he was driving or was found parked near 33-71-76th Street, Queens and 8-15-27th Avenue, Astoria and that he entered these buildings about 2 to 3 P. M. and left between 5-6 P. M. Agent Parsons then points out the difficulties encountered in a gambling investigation. He does not tell what additional investigative means were available to him but does say that it was impractical to send someone into the Hi-Way Lounge so he never tried, that no one ever tried undercover because they were known and infiltration was not tried to his knowledge. The statement that all the F. F. I. agents were known is ridiculous on its face. Could not the F. F. I. have one or two agents who fitted into this Picture?

There are two cases which outline the proper procedure:

In U. S. v. James, 494 F2d 1007 at 10015 (C. A. D. C. 1974) the Court said that in applying and considering section 2518 (3) (c) the requirement would involve consideration of all the facts and circumstances. Normal investigative procedure would include standard visual or aural surveillance, general questioning or interrogation under a grant of immunity, use of regular search warrants and an infiltration of the group by undercover agents or informants.

Agent Parsons has tried surveillance and search warrants but never one on any of the places where Russo (Mascitti) and Rossetti (DiMatteo) were observed or on them personally. (S 340) None of the people were granted immunity or taken before the Grand Jury; Infiltration was not attempted. Agent Parsons does not say that the investigation was too dangerous and does not say that witnesses were fearful of their lives if they cooperated with the F. B. I. His basis is that he has been having difficulty in getting to the upper echelon but he fails to outline any steps employed against them. He could have used a pen register or telephone tap after he had employed the other customary methods.

In U. S. v. Steinberg, 525 F2d 1126 the Government stated in its application that there was no known undercover access to a supplier because of the covert manner the defendant operated, that the defendant never kept records and isolated themselves from other individuals. In the case at bar, the Government had informers, had seized records, had visited the Hi-Way Lounge almost regularly, the agents were known to the persons in the Hi-Way Lounge and there were no threats of violence.

Agent Parsons simply employed the boiler plate or magic words as the Government has done in other cases (U.S. v. Kalustian, 529 F2d 585 9th Cir 1975). It is submitted that before electronic surveillance should be employed the Government should have searched the premises where the alleged bank operated as well as some of the individuals the bank workers met as well as the other methods of investigation set forth above.

Suppression is indicated since the Government did not pursue the ordinary methods of investigation long and hard enough to give the ~~the~~ chance to work and lead the Government to the higher up

POINT VIII

THE INVENTORY WAS NOT SERVED
UPON DI MATTEO AS REQUIRED BY
18 U.S.C. 2518 (8) (a)

18 U.S.C. section 2518 (8) (a) provides that within a reasonable time but not later than ninety days after the filing of the application for an order of approval under 2518 (7) (b) or the termination of the period of an order or extensions thereof the Judge shall be caused to be served on the parties named in the order or the application on inventory.

The expiration date on apartment 309 I was December 23, 1972, on 309 II on January 31, 1973 and the ninety day period expired on March 22, 1973 on 309 I. At this time an application to postpone the service on all 309 orders was granted to June 22, 1973 by Order of Judge Judd. This was a fixed date and was not a date from which to compute another ninety days. DiMatteo was not served with the inventory until September 8, 1973-89 days after the date set by the order. He was a named person and entitled to service. There was no excuse given by the Government for this violation of the statute.

If it is submitted an identified person must be served. While the Supreme Court in

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It is submitted an identified person must be served. While the Supreme Court in U. S. v. Donovan, Supra, decided the issue as to unidentified persons, the issue remains as to the indentified.

It is submitted that an unexcused delay of eighty nine days requires suppression as to DiMatteo.

POINT IX

THE GOVERNMENT FAILED
TO PROVE PROBABLE CAUSE
AGAINST DI MATTEO

It was mandatory for the Government to prove probable cause against Di Matteo (1) before the Attorney General could authorize the application to the Court and (2) before the Court could issue the order. Presumably, the Attorney General removed Rositti's name or identity either because he was not properly identified or because probable cause was not shown.

In Point VI the issue of the identity is discussed. Now probable cause is to be discussed.

The Supreme Court in Brinegar v. U.S., 338 U. S., at page 75, said of probable cause:

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

"The substance of all definitions of probable cause is a reasonable ground for belief of guilt... And this means less than evidence which would justify condemnation or conviction... Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed..."

Two cases illustrate the lack of probable cause here.

In Spinelli v U. S., 393 U. S. 410, the petitioner was convicted of interstate gambling under 18 U.S.C., Section 1952, despite his claim that the

commissioners warrant authorizing an F. B. I. search which uncovered evidence used at his trial, violated the Fourth Amendment. He argued that the agent's affidavit did not support probable cause for the issuance of the warrant. He challenged the constitutionality of the warrant at every stage of the proceeding. The District Court held he lacked standing, but the Circuit Court sustained the warrant attempting to apply Aguilar v. Texas, 378 U. S. 108. The search warrant was issued upon the affidavit which stated that the F. B. I. kept track of Spinelli's movements on five days during August 1965. On four occasions he was seen crossing one of the bridges between East St. Louis and St. Louis, between 11:00 A. M., and 12:15 P. M., and on four occasions parked his car between 3:30 P. M. and 4:15 P. M. in a lot used by the residents of a certain apartment house. On one day he was followed further and seen to enter a particular apartment. An F. B. I. check showed that there were two telephones with different numbers in the apartment under the name of Grace P. Hagen. The application stated that Spinelli was known to the affiant and federal officers as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers. Finally, it stated that the F. B. I. had been informed by a reliable informant that Spinelli was operating a handbook and accepting and disseminating wagering information by means of these telephones.

The Court said:

"The first two items reflect only innocent-seeming activity and data. Spinelli's travels to and from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones..

Finally, the allegation that Spinelli was "known" to the affiant and to other federal and local enforcement officers as a gambler is but a bold and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision. Nathanson v U. S., 290 U. S. 41, 46, (1933)."

The case was returned to the Circuit Court.

Another similar case with facts similar to these involved is People v Fino, 14 N. Y. 2nd 160, where the Court said:

"In the instant case, assuming the facts as set forth in the affidavit here to be true, as we must, we conclude that observations by police officers of several allegedly known book-makers entering on various occasions a private dwelling wherein there located two unlisted telephones, and nothing more, does not rise above a bare suspicion that the crime of bookmaking was being committed on the premises.

In cases involving substantially similar facts, viz., observation of known book-makers entering a private dwelling wherein several telephones were located, the courts have consistently held that such a showing was not sufficient to establish probable cause (see, e.g., United States v. Gebell, 209 F. Supp. 11; United States v. Bosch, 209 F. Supp. 15; United States v. Betz, 205 F. Supp. 927; United States v. Price, 149 F. Supp. 707; United States v. Johnson, 113 F. Supp. 359; of the following causes in which probable cause was found to have been established where, in addition to observations of known gamblers entering certain premises wherein several telephones were located (only one in Smith), it was shown that a bet had been placed by calling a telephone number at the premises (Smith v. State, 191 Md. 329); or that there was reliable confidential information of gambling activities on the premises (United States v. Woodson, 303 F. 2nd 49) or that the telephones on the premises were frequently being used to contact other known gamblers (Clay v. United States, 246 F. 2nd 298, cert. den. 355 U. S. 863; United States v. Gorman, 208 F. Supp. 747). The search warrant issued here, then was invalid."

The Government failed to prove probable cause since (1) the Government was not sure of the identity; (2) the evidence against him is guesswork and highly speculative; (3) there is no evidence that he did anything illegal; (4) there is no evidence he was in apartment 309 and (5) the parking of an automobile does not mean that he was engaged in illegal activities.

No probale cause was shown against DiMatteo and all evidence obtained
by the wire tap of December 8, 1972 against him should be suppressed.

OTHER POINTS

THE APPELLANT DIMATTEO JOINS IN AND
ACCEPTS THE ARGUMENTS OF THE OTHER
DEFENDANTS INSOFAR AS THEIR PLEA
SUPPORT HIS POINTS AND JOINS IN ON ANY
POINTS NOT RAISED IN HIS BRIEF WHICH
INURED TO HIS BENEFIT.

THE APPELLANT, DIMATTEO, ALSO
ADVANCES THE POINT RAISED BELOW THAT
TASK FORCE ATTORNEYS APPEARED BEFORE THE
GRAND JURY. SINCE THIS ISSUE HAS BEEN
DECIDED PRO AND CON, THE APPELLANT
WISHES TO PRESERVE HIS RIGHTS ON IT.

CONCLUSION

THE EVIDENCE OBTAINED BY THE ORAL
ELECTRONIC SURVEILLANCE BOTH AT

APARTMENT 309 AND AT THE HI-WAY
LOUNGE AS WELL AS THE EVIDENCE OB-
TAINED BY THE PEN REGISTER SHOULD
BE SUPPRESSED AND THE CONVICTION
REVERSED AND THE INDICTMENT DIS-
MISSED OR IN THE ALTERNATIVE A
SEPARATE TRIAL ORDERED ON COUNT 4 WITH
ALL EVIDENCE OBTAINED BY THE ELECTRONIC
SURVEILLIANCE SUPPRESSED AND ALL OTHER
EVIDENCE OBTAINED AS A RESULT OF IT
SUPPRESSED.

Respectfully Submitted,

RICHARDS W. HANNAH
Attorney for Defendant-
Appellant, Anthony DiMatteo
586-Fourth Street
Brooklyn, New York 11215
212-768-0611

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

USA VS

SCAFIDI

State of New York, County of New York, ss.:

HAROLD DUDASH
agent for Richard W. Hannah, , being duly sworn deposes and says that he is
the attorney
for the above named appellant A. DiMatteo herein. That he is over
21 years of age, is not a party to the action and resides at 2346 Holland avenue, BX, NY

That on the 8th day of february, 1977, 19 , he served the within brief for appellant
Anthony DiMatteo

upon the attorneys for the parties and at the addresses as specified below

Michael E. Moore, c/o T. George Gilinsky, P.O. Box 899 Ben Franklin Station
Washington , D.C. 20044

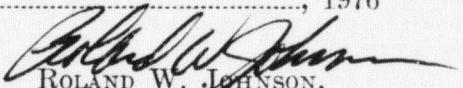
by depositing two copies

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, his 8th
february, 1977
day of , 1976


ROLAND W. JOHNSON,

Notary Public, State of New York

No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1977



THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

USA

VS

SCAFIDI

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:
BERNARD S. GREENBERG,

being duly sworn,
deposes and says that he is over the age of 21 years and resides at 162 E 7th st NY, NY

That on the 8th day of February, 1977, ~~1975~~
he served the annexed brief for appellant Anthony DiMatteo upon

1. Thomas J. O'Brien 2 Penn Plaza, NY, NY (one copy)
2. Albert J. Brackley, 186 Joralemon street, Brooklyn, NY (one Copy)
3. Gustave H. Newman, 522 Fifth Avenue, NY, NY (one copy)
4. Salvatore Piazza, 824 Manhatten Avenue, Brooklyn, NY (one copy)
5. Dominick Di Carlo, 66 court Street, Brooklyn, NY (one copy)
6. David Gottlieb, Federal Defendant Services Unit, U.S. Courthouse room 509 Foley Square, NY, NY (one copy)
7. Arnold E. Wallach, 11 Park Place, NY, NY (one copy)
8. Max Wild, 645 Fifth Avenue, NY, NY (One copy)
9. David G. Trager, 35 Tillary Street, Brooklyn, NY (two copies)

in this action, by delivering to and leaving with said attorneys

the above number of copies each

~~one~~ copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 8th
day of February, 1977, 1975

{ *Bernard S. Greenberg*

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
Commission No. 100,000
Qualified in Orange County
Commissioned March 30, 1977